Caterpillar, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Locals 751 and 974. Cases 33–CA–10649, 33–CA–10718, 33–CA–10744, and 33–CA–10746

August 11, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On July 5, 1996, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed limited cross-exceptions and supporting briefs. The General Counsel also filed a brief in partial support of the judge's decision. The General Counsel, the Charging Party, and the Respondent all filed answering briefs, and the Charging Party and the Respondent filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.[2]

At issue before the Board are eight complaint allegations of violations of Section 8(a)(1) of the Act. The judge recommended that four complaint allegations be dismissed, but found merit in four others. We agree with the result the judge reached in all eight instances, and, subject to the modifications discussed below, we also agree with his rationale.

I. THE COMPLAINT ALLEGATIONS THE JUDGE DISMISSED

1. The judge recommended dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) when Supervisor Terry Dukeman ordered a bulletin board taken down shortly after a grievance was filed about the removal of union-related material from that bulletin board. In affirming the judge, we rely solely on the judge's crediting of Dukeman's testimony that prior to the incident in question, he was not aware of the presence of the bulletin board, and that he ordered the bulletin board removed because it was a safety hazard.

2. Based on his credibility resolutions, we also adopt the judge's recommendations that the following three additional complaint allegations be dismissed:

(a) The allegation that Supervisor Wendall Uphoff told employee Larry Bullock that ''it would be best if you didn't post anything with 'UAW' on it.''

(b) The allegation that Supervisor Dukeman told employees that a bulletin board would be restored in department 8333 if grievances were not filed when items were removed by management.

(c) The allegation that Factory Manager James Goddard threatened to discipline the employee who posted a notice of a union rally on the wall adjacent to a bulletin board.

II. THE UNFAIR LABOR PRACTICES THE JUDGE FOUND

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) by discriminatorily removing two ''Health Safety'' fliers which employee Larry Bullock posted on an employee bulletin board. In adopting the judge's finding, however, we do not rely on two aspects of his rationale.

First, although we agree with the judge that Bullock's posting of the union fliers constituted protected concerted activity, we do not adopt all of the judge's reasoning. In this regard, the judge found that Bullock's purpose was not to provide for a safer workplace, but to further the Union's cause among employees. We note, however, that both of these purposes fall well within the scope of Section 7 protections, and the fliers themselves address both themes. Thus, the record shows that the fliers Bullock posted were prepared by Local 974's Health and Safety Committee, and they each contained safety information. In addition, they were critical of management's health and safety practices, and they portrayed the Union as the only party truly concerned about the employees' welfare. Accordingly, we find that Bullock's posting of the fliers constituted protected concerted activity regardless of whether his purpose was to promote employee health and safety or, as the judge found, to promote employee support for the Union.

Second, although we agree with the judge that there is no merit in the Respondent's claim that the fliers' purpose was to encourage unprotected activity, we do not adopt the judge's reasoning. Specifically, the judge found that the Union was engaged in a ''work-to-rule'' campaign designed to encourage union supporters to interfere with production, citing Administrative Law Judge Rose's findings in Case 33–CA–10453, et al.[3]

[1] The General Counsel, the Charging Party and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In *Caterpillar, Inc.*, 322 NLRB 690 (1996), we issued a broad cease-and-desist Order because of the Respondent's proclivity to violate the Act. We shall, accordingly, modify the judge's recommended Order and substitute a new notice to include broad cease-and-desist language.

[3] Judge Rose found that engaging in ''work-to-rule'' was unprotected activity.

The judge ultimately concluded, however, that the Respondent failed to establish that the fliers Bullock posted advocated unprotected partial strike activity.

Subsequent to the judge's decision in the instant case, the Board issued its decision in Case 32–CA–10453, et al., in which the Board expressly did not adopt Judge Rose's findings on work-to-rule. *Caterpillar, Inc.*, 322 NLRB 674 (1996). Instead, the Board emphasized that it would ''assume arguendo solely for the purpose of deciding this portion of the consolidated proceeding that the judge's findings on work-to-rule are correct.'' *Caterpillar*, supra.

We shall take the same approach here and assume arguendo that the Union conducted an unprotected work-to-rule campaign.[4] We find, however, that there is no clear connection between the fliers Bullock posted and work-to-rule.

The fliers are each two pages long. One flier is captioned ''WHY SHOULD EVERY WORKER READ THIS FLYER ON SAFETY AND HEALTH? CAUSE IT COULD SAVE YOUR LIFE!'' This flier claims that employees working for the Respondent could jeopardize their health and safety, and refers to union efforts to obtain safer working conditions. The phrase ''working to safety rule'' appears once in this flier in the context of the following paragraph:

> WHAT YOU DON'T KNOW *CAN* HURT YOU
>
> You have a right to a clean, healthy and safe work environment. The OSHA law says it, the company professes it, but only you can demand it. The Union Health and Safety Program is about workers sticking together for a better, safer workplace. Join us by working to SAFETY RULE. Cause it might save your life and your loved ones.

This flier concludes by urging employees to ''use your worker rights in health and safety,'' including a right under the Occupational Safety and Health Act to question the safety of the workplace, a right to have access to and copies of company health and safety records, and a right to consult with a Union Health and Safety committee person.

The second flier is captioned ''Emergency Response—NOT!'' The flier begins by describing what should occur if an employee is injured at work: ''The volunteer emergency technicians arrive to aid, and, if need be, you will be quickly taken to the hospital.'' The flier then criticizes the Respondent's poor response time in two health emergencies. In one instance, the flier claims that an employee suffered a heart attack at work, but more than 30 minutes elapsed before he reached the hospital. In the second instance, the flier relates how an employee was injured on the job, but again help did not arrive for 30 minutes. This flier concludes as follows:

> The company can come up with any number of reasons for the delays in these two stories, but the truth remains the same. They don't care about your safety. They don't care about your pain or injuries. **Because IF they did care—you would get more than just lip service.**
>
> **REMEMBER:**
>
> **WORK TO THE SAFETY RULE**

In sum, the phrase ''work'' (or ''working'') ''to safety rule'' appears once in each flier. There is no other language in either flier that even arguably encourages employees to reduce output. The message that employees should ''work to safety rule'' is clearly not the main thrust of the fliers, and the phrase itself is ambiguous. Concededly, ''work to safety rule'' is similar to ''work to rule,'' but the Respondent has not established that the two phrases have the same meaning. To the contrary, the context in which the former phrase appears suggests that it has a different meaning than the latter. In light of the safety information contained in the fliers and the fliers' criticism of the Respondent's health and safety practices, one reasonable interpretation of the ''work to safety rule'' message is that employees should be knowledgeable about their rights to a safe workplace and aggressive in asserting those rights, because the Respondent cannot be relied on to follow its own rules and provide a safe working environment. Thus, the phrase ''work to safety rule'' could merely be a means of urging employees to work in accordance with the rules of safety that have been established for their benefit. The Respondent has not shown that these words can only be interpreted as advocating unprotected work-to-rule activity.

Under these circumstances, we conclude that the presence of the statement that employees should ''work to safety rule'' is not sufficient to remove the fliers from the scope of Section 7 of the Act. See *Fairfax Hospital*, 310 NLRB 299, 300 (1993) (''oblique'' and ''inherently ambiguous'' statement uttered in the course of union activity found to be protected by the Act), enfd. 14 F.3d 594 (4th Cir. 1993). Therefore, we adopt the judge's finding that the posting of the fliers constituted protected concerted activity, and that the Respondent violated Section 8(a)(1) by discriminatorily removing them.[5]

[4] We reiterate what we said in the earlier *Caterpillar* case: ''[W]e are merely 'assuming arguendo' that the judge's work-to-rule findings are correct. The parties should not interpret our decision today as a final and definitive ruling on the difficult issues raised by work-to-rule.'' 322 NLRB 674 at fn. 6.

[5] Member Higgins agrees that the Respondent violated Sec. 8(a)(1) by removing a *Catholic Times* article posted on a cell bulletin board

2. The judge found, and we agree, that the Respondent violated Section 8(a)(1) by discriminatorily removing the ''Permanently Replace Fites'' and ''No Reply'' fliers that employee Mike Hoadley posted on the open union bulletin board in building D of the Respondent's Decatur, Illinois facility. The judge relied, inter alia, on Judge Rose's decision in Case 33–CA–10158, et al., in which Judge Rose found that the ''Permanently Replace Fites'' message was protected by the Act. We note that, subsequent to the issuance of the judge's decision in the instant case, the Board affirmed Judge Rose's finding. *Caterpillar, Inc.*, 321 NLRB 1178 (1996).

3. For the reasons stated by the judge, we adopt his finding that the Respondent violated Section 8(a)(1) by discriminatorily removing the *Catholic Times* article employee Dick Goodman posted on the cell bulletin board in building B of the Respondent's Decatur facility.

4. For the reasons stated by the judge, we adopt his finding that the Respondent violated Section 8(a)(1) by discriminatorily removing a union notice from a wall near an employee bulletin board in the Respondent's Decatur facility. In its exceptions, the Respondent, inter alia, renews its contention that this complaint allegation is barred by Section 10(b). Although we agree with the judge's rejection of this defense, we find that the issue warrants further explanation.

The record shows that the union notice in question was removed by the Respondent on January 5, 1994. Within 6 months of that date, specifically on June 16, 1994, the Union filed an unfair labor practice charge in Case 33–CA–10744, alleging that the Respondent violated Section 8(a)(1) by the following conduct: ''On or around March 24 . . . the Employer, at its Decatur facility, unlawfully and discriminatorily removed Union flyers from a wall at its facility.'' The complaint alleges that ''in early February, 1994,'' the Respondent violated Section 8(a)(1) by removing ''a Union notice from the wall adjacent to a bulletin board in department or location D408 at Respondent's Decatur, Illinois facility, that contained both work-related and non-work items.''

The Respondent does not claim that it was prejudiced by the discrepancy of only a few weeks between the date on which the complaint alleges a violation occurred and the date on which the evidence establishes the violation actually occurred. The record would not support such a contention in any event, because this matter was fully litigated at the hearing. Rather, the Respondent's main contention is that the charge is legally insufficient to support the unfair labor practice alleged in the complaint.

In deciding whether a charge allegation provides a sufficient basis for a complaint allegation, the Board applies a ''closely related'' test comprised of the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. See *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115 (1988).

Applying this test, we find that all these factors are satisfied here. First, the allegations involve the same section of the Act (Section 8(a)(1)) and the same legal theory (discriminatory removal of union material). Second, the allegations involve similar conduct (removal of union material posted on a wall) occurring at the same Respondent facility (Decatur) during the same time period (February—March 1994). Third, the allegations share common defenses (employees allegedly were not allowed to affix material to plant walls and article 16.4 of the Respondent's implemented proposal allegedly restricted union notices to union bulletin boards). Accordingly, we find that the complaint allegation is not barred by Section 10(b), and we affirm the judge's unfair labor practice finding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Caterpillar, Inc., Peoria, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily remove from bulletin boards or plant walls notices of union events or other postings supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or a UAW local union.

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by employee Goodman. See infra. Accordingly, he finds it unnecessary to determine whether the Respondent also violated Sec. 8(a)(1) by removing other material from or near bulletin boards.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CATERPILLAR, INC.

Debra Stefanik, Esq., for the General Counsel.
Columbus Gangemi, Neil Holmen, and *Joseph Torres, Esqs. (Winston & Strawn)*, of Chicago, Illinois, and *Thomas Harvel, Esq. (Westerfelt, Johnson, Nicoll & Keller)*, of Peoria, Illinois, for the Respondent.
Stanley Eisenstein and *Jane Bohman, Esqs. (Katz, Friedman, Schur & Eagle)*, of Chicago, Illinois, and *William Thompson II, Esq. (Zwerdling & Paul)*, of Washington, D.C., and *Nancy Schiffer, Esq.*, of Detroit, Michigan, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The bitter and still unresolved contract dispute between Caterpillar Inc. and the UAW began in October 1991, more than 4-1/2 years ago.[1] Complaints by the General Counsel against Caterpillar followed, complaints based on dozens of unfair labor practice charges filed by the UAW.

For a time all such complaints (Cases 33–CA–9876–3, et al.) were consolidated into one proceeding before Administrative Law Judge James L. Rose. But in November 1994 Judge Rose denied a motion by the General Counsel to consolidate numerous additional complaints into the ongoing *Caterpillar* proceeding. That led to the institution of another consolidated proceeding involving Caterpillar and the UAW, a case known as *Cat II* (Cases 33–CA–10444, et al.).[2]

At this juncture I have held 20 days of hearings in *Cat II*. Among the cases heard to date are one involving materials posted on a bulletin board by an employee in Caterpillar's East Peoria plant, two involving materials posted on bulletin boards by employees in Caterpillar's Decatur plant, and one involving material posted on a wall by an employee in the Decatur plant.[3]

At the conclusion of the presentation of the evidence concerning these four cases the General Counsel moved to sever the three Decatur cases for briefing and decision and separately moved to sever the East Peoria case for briefing and decision. Orally at the hearing and then in a written order dated February 22, 1996, I granted the General Counsel's motion, except that I ruled that all four cases should be briefed and then decided together (as opposed to setting separate time schedules for the Decatur cases, on the one hand, and the East Peoria case, on the other).

The four cases have now been briefed by the General Counsel, by Caterpillar, and by the UAW.[4] They stand ready for decision.[5]

THE EAST PEORIA BULLETIN BOARD CASE[6]

I.

In East Peoria, as in apparently all the Caterpillar facilities in which the employees are represented by the UAW, Caterpillar maintains at least three different kinds of bulletin boards: company bulletin boards, invariably glass enclosed;[7] ''union'' bulletin boards (which are the subject of one of the Decatur building D cases, infra); and ''general'' or ''employee'' bulletin boards.

In that last respect, in the late 1980s, or perhaps earlier, Caterpillar installed cork bulletin boards in many of the nonwork areas at many, perhaps all, of its facilities. I will call these bulletin boards ''employee bulletin boards'' even though supervisors and even contractor personnel sometimes post items on the bulletin boards and even though several Caterpillar supervisors testified that, in the East Peoria and Decatur plants, at least, they never use the term ''employee bulletin board.''

At all relevant times Caterpillar employee Larry Bullock worked in building KK at Caterpillar's East Peoria facility.[8] Bargaining unit employees in Caterpillar's East Peoria facility are represented by the UAW International and its Local Union 974. Bullock is a member of the UAW.

There is an employee bulletin board next to the restroom close to Bullock's work station. Most of the items on that board can be thought of, broadly, as notices. For example: notices of items for sale; notices of retirement parties; bereavement notices; thank you notes (where, for instance, a group of employees had collectively done a favor for the family of an employee); birthday cards; lists of wage rates and associated union dues prepared by Local 974; and notices about upcoming church functions. But other kinds of materials also routinely show up on the bulletin board, materials such as campaign literature on behalf of candidates for union office, national political literature, Bible quotations,

[1] In this decision the term UAW refers collectively to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW International) and to the relevant local union or unions.

[2] For a listing of the case numbers making up *Cat II*, see my order dated April 19, 1995, and attachment B to the General Counsel's May 31, 1996 response to the Board's April 15, 1996 Notice to Show Cause. *Cat II*'s existence is based, in part, on my April 19 order, in which I granted the General Counsel's motion to consolidate. That order is now before the Board by way of the UAW's request for special permission to appeal. See the above-cited Notice to Show Cause.

[3] These four cases are the subject of one consolidated complaint: G.C. Exh. 1050(o) (duplicated at G.C. Exh. 1064(c)). An error in the complaint is corrected by G.C. Exhs. 1050(q) and 1064(e).

[4] For reasons having to do with the parties' possible use in *Cat II* of evidentiary materials from *Cat I*, I permitted the parties to file reply briefs. (By ''*Cat I*'' I mean, of course, the consolidated Caterpillar cases being heard by Judge Rose.) Each of the three parties has filed an brief and a reply brief in the *Bulletin Board* cases.

[5] As all parties agree, Caterpillar is an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act), the UAW International and its local unions are labor organizations within the meaning of the Act, and the Board has jurisdiction over this matter. I shall rely in all further phases of *Cat II* on these jurisdictional findings.

[6] Case 33–CA–10649.

[7] ''Company bulletin boards are put up in a main hallway with things like right to know, legal things that they put up about discrimination or whatever . . . . They put up things about safety.'' (Witness Dukeman at Tr. 3072, referring to company bulletin boards at Decatur.)

[8] Caterpillar's transmission business unit (TBU) is located in building KK, and all of building KK is devoted to the TBU. Thus, for the purposes of this proceeding the terms ''TBU'' and ''building KK'' may be used interchangeably.

weekly newsletters published by local churches, newspaper articles relating to the contract dispute between the UAW and Caterpillar, and, occasionally, anti-Caterpillar fliers prepared by the UAW.

On November 23, 1993, Bullock posted on the bulletin board two fliers prepared by Local 974's health & safety committee. Bullock's immediate supervisor was Wendell Uphoff.[9] Later that day Uphoff removed the two fliers, which action led to a conversation between Bullock and Uphoff about the posting. On the following day Bullock and Uphoff had another conversation about the bulletin board. The General Counsel contends that Caterpillar violated Section 8(a)(1) of the Act by Uphoff's removal of the fliers and an utterance on November 23 and by certain additional utterances on November 24.

Bullock also posted two newspaper articles that were later removed from the bulletin board. The complaint is worded broadly enough to encompass actions by Caterpillar in respect to those newspaper articles. But there is insufficient evidence that Caterpillar's management had anything to do with the removal of the articles from the bulletin board or that Caterpillar otherwise violated the Act in respect to those articles. The remainder of the discussion in this decision about the East Peoria bulletin board accordingly focuses on the two fliers that Bullock posted.

II.

While Caterpillar supervisors occasionally speak to individual employees about what may and may not be posted on an employee bulletin board, Caterpillar has not issued any directives, written or oral, to its East Peoria employees as a group about bulletin board usage. (The record indicates that when the employee bulletin boards were first installed—in the late 1980s, but not thereafter, employees involved in the installation of the bulletin boards orally agreed with management about the kinds of materials appropriate for posting on the boards. The record also indicates, however, that as of 1993 and thereafter, at least, the employees working in building KK were unaware of any such agreement.)

From time to time Caterpillar instructs its first-line supervisors in building KK about their duties in respect to the employee bulletin boards. The supervisors are told that they are responsible for assuring that only appropriate materials are posted on the employee bulletin boards. Appropriate materials include what I described above as notices (thank you cards and the like, items for sale, notices of meetings, and so forth). Inappropriate materials include anything that requires more than a few seconds to read (one witness for Caterpillar credibly referred to a ''10-second'' standard[10]) and any materials espousing an individual's personal beliefs or materials that might result in conflict on the shop floor. Thus, according to the instructions that the supervisors receive, inappropriate postings include those urging any particular viewpoint about politics, religion, the UAW, or Caterpillar.

From time to time supervisors do implement these instructions. Thus at all relevant times supervisors, including Uphoff, routinely removed from employee bulletin boards materials arguing for or against religious or political positions and prounion and antiunion materials. But as one might expect, the monitoring of bulletin boards is not a high priority concern for supervisors, so that supervisors check the bulletin boards for improper postings only irregularly. The result is that a week might pass before any given bulletin board is checked by a supervisor.

III.

As already noted, on November 23, 1993, Bullock posted two fliers prepared by Local 974's health & safety committee.[11] The fliers are each two pages long. They each start with the words ''Health Safety'' in large letters.[12] Each provides some safety information. But the purpose of the fliers, and Bullock's purpose in posting them, was not to provide for a safer workplace but instead to increase the dedication and support for the UAW among Caterpillar's employees and to convince employees that Caterpillar's management is not to be trusted. I make that finding based on the testimony I have heard and exhibits I have read to date in *Cat II*, on the *Cat I* materials that the parties have designated, and on the two fliers themselves.[13] In that last regard, for example, the final words of one of the fliers that Bullock posted are (capitalization in the original):

A MESSAGE TO CAT:
KILL YOUR FINAL OFFER
NOT YOUR EMPLOYEES!

Again as examples, the other flier includes three cartoons that take up about one-third of the space in the flier. One cartoon shows a member of management telling an obviously ill blue collar worker, ''sorry Rhodes, but if I let you go home, I'd have to do the same to any employee who had a heart attack.'' The other two cartoons are in a similar vein in that both portray heartless Caterpillar supervisors willfully endangering the well being of Caterpillar employees.

Each flier takes a minute or two to read.

As also already noted, Caterpillar Supervisor Uphoff removed the two fliers the same day that Bullock had posted

[9] Caterpillar admits that Uphoff and all the other persons I refer to in this decision as supervisors or to whom I assign management titles are supervisors within the meaning of Sec. 2(11) of the Act.

[10] Witness Domnick at, e.g., Tr. 3365.

[11] The fliers are in the record as G.C. Exhs. 1069 and 1070. (At the outset of *Cat II*, I ruled that the parties could cite designated evidentiary materials from *Cat I*. In order to avoid confusion about whether a given exhibit was introduced in *Cat II* or was, instead, a *Cat I* exhibit, each party gave the number 1001 to its first *Cat II* exhibit. Thus, for example, the General Counsel's exhibits in *Cat II* are designated G.C. Exh. 1001, G.C. Exh. 1002, and so forth.)

[12] The ''Health Safety'' fliers have as a kind of subtitle: ''More of Cat's Timebombs?'' And between the words ''Health'' and ''Safety'' in the title of the fliers is an illustration of a cartoon-type bomb—a black ball from which a lit fuse extends. The parties have thus taken to calling the documents ''Timebomb fliers.''

[13] In respect to the use of the *Cat I* record in *Cat II*, see, e.g., the Board's April 15, 1996 Notice to Show Cause at pp. 1–2 and my February 22, 1996 order. I note that in that order, at p. 2, I state that, ''at this juncture it appears to me that the fact that Caterpillar and the UAW have been engaged in an intense struggle with one another since 1991 is beside the point as regards a decision'' in the four bulletin board cases. But as indicated above and again later in this decision, my reexamination of the *Cat I* and *Cat II* records has convinced me that certain facets of the *Cat I* record are relevant here.

them. (Bullock posted them at about 7 a.m. Uphoff removed them about 1 p.m.) Bullock asked Uphoff why he had done that. Uphoff replied that the bulletin board was ''not for Larry Bullock union propaganda bullshit.''[14]

Uphoff credibly testified that he removed the fliers after an employee had mentioned them to him. I further find that Uphoff would have removed the fliers on noticing them if, instead of being aimed at Caterpillar's management, the fliers had attacked, say, the UAW or a religious or political group.

I conclude that, by Uphoff's removal of the two fliers from the bulletin board, coupled with his utterance about why he removed the fliers, Caterpillar violated Section 8(a)(1) of the Act.

I start with the assumption, arguendo, that Caterpillar was, and is, entitled to implement a rule permitting employees to post on employee bulletin boards meeting notices, thank you cards, bereavement notices, and for-sale items (so long as those items are short enough to be quickly read) while prohibiting employees from posting anything that requires more than a few seconds to read and any materials espousing particular points of view.[15]

That assumption leads to two more: that Caterpillar could properly have published and enforced a bulletin board rule akin to the instructions that it gave to its supervisors; and that had Caterpillar done so, Uphoff's removal of the two fliers that Bullock posted would have violated no provision of the Act even given, perhaps, Uphoff's remark about ''union propaganda.''

But Caterpillar had no such rule. In so finding, I make one last assumption (again arguendo) that Caterpillar could rely on the existence of such a rule even though none was explicitly promulgated to employees if, but only if, Caterpillar's supervisors day by day, month after month, rigorously carried out their instructions regarding the employee bulletin boards. As touched on above, however, Caterpillar's supervisors did not carry out their bulletin board instructions in that manner. The result is that building KK's employees had no reason to conclude that it was Caterpillar policy to disallow the posting of all materials espousing personal beliefs or materials too long to be read in a fraction of a minute.

There remains the fact that, from one point of view, Uphoff's removal of the two fliers was not discriminatory. As stated above, Uphoff would have responded the same way had any other kind of posting that amounted to an expression of personal belief come to Uphoff's attention. Additionally it is noteworthy that, as Bullock knew, other editions of ''Health Safety'' fliers had previously been posted on employee bulletin boards in building KK, apparently without drawing supervisory attention.

But as just stated, building KK's employees had no reason to conclude that it was Caterpillar policy to disallow the posting of all materials espousing personal beliefs or materials too long to be read in a fraction of a minute. In this circumstance, an employee would reasonably conclude that Uphoff chose to remove the two fliers from the bulletin board because of the fliers' pro-UAW, anti-Caterpillar, content given that: (1) Uphoff removed the fliers the same day that Bullock had posted them; and (2) Uphoff gave as his reason for the removal that the bulletin board was ''not for Larry Bullock union propaganda bullshit.'' Caterpillar accordingly interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, thereby violating Section 8(a)(1). See, e.g., *Honeywell, Inc*., supra.

IV.

I have been proceeding on the assumption that Bullock's posting of the ''Health Safety'' fliers was ''concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection'' (in the words of Sec. 7 of the Act). *Caterpillar*, however, argues that Bullock's action in posting the fliers was not protected in that his intent was to ''create disturbances,'' to ''encourage hysteria,'' and to encourage employees to work at below-par levels.[16]

Having considered Caterpillar's arguments, I remain of the view that Bullock's action in posting the two fliers constituted protected activity. To begin with, and as stated earlier, I find that Bullock's purposes in posting the fliers included furthering the UAW's cause among Caterpillar employees. Thus the posting of the fliers was ''concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection,'' in the words of Section 7 of the Act.

That does not end the analysis, of course. For instance, if the fliers' purpose had been to encourage unprotected activity, Caterpillar's action in removing them would not have violated the Act. In this connection Caterpillar points out that both fliers urge employees to work to the ''safety rule.'' (One states: ''Join us by working to SAFETY RULE.''[17] The other concludes with the words—''REMEMBER: WORK TO SAFETY RULE.''[18]) Caterpillar argues that the UAW has used a similar phrase, ''work to rule,'' to encourage union adherents to interfere with production and that that was Bullock's purpose here.

I deem the issue raised by this Caterpillar argument to be a serious one. The UAW has used the expression ''work to rule'' as a way of encouraging employees to reduce output to unacceptably low levels in an attempt to pressure Caterpillar into acceding to the UAW's bargaining proposals. The designated *Cat I* evidentiary materials amply show that to be the case. (I need not explicate further because Administrative Law Judge Rose has already done so. See his *Cat I* decision JD–75–95 at 8–11.[19]) And since I have found that Bullock

[14] Witness Bullock, Tr. 3252.

[15] The focus of these bulletin board cases is on whether Caterpillar violated Sec. 8(a)(1). I accordingly do not here consider Caterpillar's obligations regarding bulletin board rules under Sec. 8(a)(5) and (d). As to the validity of the above assumption, I note only that the Board appears not to have dealt with that precise issue notwithstanding cases like *Vons Grocery Co*., 320 NLRB 53 (1995); *Honeywell, Inc*., 262 NLRB 1402 (1982); and *Arkansas-Best Freight System*, 257 NLRB 420 (1981), enfd. per curiam 673 F.2d 228 (8th Cir. 1982), since none of those cases involves a nondiscriminatory rule prohibiting the posting of a class of materials which class encompasses certain types of prounion materials.

[16] Br. at 7–8.

[17] G.C. Exh. 1069 at 1. (Capitalization in original.)

[18] G.C. Exh. 1070 at 2. (Capitalization in original.)

[19] Ordinarily it is inappropriate for one administrative law judge to rely on the findings or conclusions of another administrative law judge in a decision of the second judge that is before the Board on exceptions. See *American Thread Co*., 270 NLRB 526 fn. 2 (1984); *Delchamps, Inc*., 234 NLRB 262, 271 at fn. 23 (1978), enf. denied on other grounds 588 F.2d 476 (5th Cir. 1979). But because of the

did not post the fliers out of a concern for employee safety, the question arises as to what, if anything, Bullock intended to communicate by the expression ''work to safety rule'' in the two fliers that he posted.

It was, however, Caterpillar's burden to prove that Bullock wanted readers of the fliers to reduce their output—that is, that Bullock was calling for a partial strike. And apart from the ''work to safety rule'' language in the fliers themselves, there is no such proof. As for the significance of the work-to-safety-rule language, while it appears in capital letters in both fliers, and in a prominent location in one of the fliers, in each flier it appears only once. And in neither of the fliers, as I read them, is ''working to safety rule'' the main thrust of the flier. I accordingly conclude that I have insufficient grounds to find that Bullock intended to have readers of the fliers focus on the phrases in question. It could very well be that Bullock did not concern himself with those phrases at all—that they just happened to be part of two fliers whose overall message Bullock did support. (Presumably Caterpillar also could have made out a defense by proving that, whatever Bullock's intent, the fliers were such as to cause employees to engage in a partial strike. But again, the record does not support Caterpillar in this regard.)

There is one last matter to consider, albeit briefly, concerning Uphoff's removing the two fliers from the employee bulletin board: Caterpillar provides ''union'' bulletin boards in all its facilities in which the employees are represented by the UAW. Caterpillar does so in accordance with past collective-bargaining agreements between the UAW and Caterpillar and under the terms of the proposed collective-bargaining agreement that Caterpillar implemented in April 1992.[20] The question that raises is whether that means that all union-related materials should be posted on the union bulletin boards, not on employee bulletin board. The short answer is that it does not. To begin with, in respect to the employee bulletin board that Bullock used, there is a longstanding practice of employees posting all kinds of union-related materials. Second, Caterpillar's labor relations manager for building KK testified that some union-related material (such as rally notices and notices of union committee meetings) may properly be posted on employee bulletin boards. Third, for reasons that will be discussed in connection with the Decatur bulletin board cases, the collective-bargaining agreement provision and implemented-agreement provision in question do not have the effect of limiting what employees may post on employee bulletin boards.

V.

Bullock filed a grievance over Uphoff's removal of the two ''Health Safety'' fliers. Bullock testified that Uphoff, at the first step meeting on November 24, said that while he had removed the fliers, he had since ''changed his ways.'' But Uphoff credibly denied saying any such thing and I conclude that the General Counsel and the UAW failed to prove that Uphoff did make such a remark.

Bullock also testified that, about a half-hour after the first step meeting, Uphoff told him: ''it would be best if you didn't post anything with 'UAW' on it.'' Uphoff denied it. I credit that denial because a remark like that would have been out of keeping with what Uphoff's instructions were[21] and with what seemed to me to be Uphoff's supervisory style, and because UAW-originated items routinely showed up on the bulletin board.

I accordingly shall recommend dismissal of paragraph 5(h) of the complaint.[22]

THE DECATUR BUILDING D BULLETIN BOARD CASE[23]

I.

We move now from building KK in East Peoria to Caterpillar's building D in Decatur. Caterpillar's Decatur facilities are within the jurisdiction of UAW Local 751.

Our concern here is with union bulletin boards. (By ''union'' bulletin boards, I mean bulletin boards that, in Decatur, state at the top, ''U.A.W. Local 751.'')

The collective-bargaining agreement that Caterpillar proposed to the UAW and then unilaterally implemented includes the following provision, article 16.4, which provision is identical to the most recent agreement (now expired) between Caterpillar and the Union[24] and with the expired local supplement to the central agreement.[25]

> The Company shall provide bulletin boards at locations mutually agreed to by plant management and its Local Union, to be used exclusively for Union notices. The notices will be furnished by the Union and posted by the Company in accordance with the provisions of applicable Local Agreements. The Union notices shall be restricted to the following:
>
> 1. Notices of Union recreational and social affairs
> 2. Notices of Union elections, appointments and results of Union elections
> 3. Notices of Union meetings
> 4. Reports of committees, approved by the Company

Many of the union bulletin boards in building D are glass enclosed. Postings on these bulletin boards are handled in accordance with article 16.4. That is, Local 751 furnishes to

special relationship between *Cat I* and *Cat II*, I advised the *Cat II* parties that I would take into account the findings and conclusions in Judge Rose's *Cat I* decisions even prior to action by the Board on those decisions.

[20] See, e.g., Judge Rose's decision in *Cat I*, JD–208–95, and the preface in the ''Proposed Central Agreement,'' G.C. Exh. 26. (G.C. Exh. 26 is part of the *Cat I* record. All parties agree that that exhibit should be deemed to be part of the *Cat II* record as well.)

[21] Although Uphoff's testimony is fuzzy in this respect, he seemed to deny ever receiving instructions on what materials he was supposed to remove from bulletin boards. But I find that he did receive such instructions and that his denial was a function of his having forgotten that he received them. I note, in this connection, that Uphoff had retired from Caterpillar prior to his stint on the witness stand.

[22] Par. 5(h) reads: ''On or about November 24, 1994, Respondent, by Wendall Uphoff, prohibited an employee from posting anything that 'said UAW anywhere on it' on [a bulletin board in Building KK].''

[23] Case 33–CA–10718.

[24] G.C. Exh. 26 (from the *Cat I* record) at pp. 119–120.

[25] For convenience's sake, Caterpillar presented art. 16.4, as in the implemented agreement, for inclusion in the record in *Cat II* as R. Exh. 1015. See also R. Exh. 1014 (art. 16 of the expired Decatur Plant–Local Union 751 Supplement.)

Caterpillar documents that the Union wants posted. Caterpillar then posts the documents if the Company deems them to be within the scope of article 16.4. (No one contends that Caterpillar has behaved unlawfully in respect to the glass-enclosed union bulletin boards.)

Other union bulletin boards in building D are not glass enclosed. The way these bulletin boards are used is very different from the usage of the glass-enclosed boards. To begin with, it is not entirely clear that Caterpillar treats these open bulletin boards as boards subject to article 16.4. Second, in many cases, perhaps all, employees post materials on these boards—they do not follow the procedures set out in article 16.4. Third, the materials posted on these boards are by no means limited to those fitting within the categories listed in article 16.4. Rather, along with notices of union meetings, these open union bulletin boards routinely display: information about union dues and cost-of-living adjustments; jokes and cartoons; notices of when a union lawyer will be at the hall; literature on behalf of candidates for union office; thank you notes from candidates who had been voted into union office; and newspaper articles about the labor dispute. Employees also sometimes use these open union bulletin boards to post items that have nothing to do with union matters, items like church benefit announcements and sympathy cards. (These last types of postings generally occur when nearby employee bulletin boards are already completely covered by postings.[26])

At all relevant times Caterpillar assigned its employee Mike Hoadley to building D. Hoadley actively supported the UAW's efforts to gain what the Union considered to be a favorable collective-bargaining agreement from Caterpillar.

There is a union bulletin board hung on a wall in a nonwork area near Hoadley's work station. The bulletin board is not glass enclosed. On the morning of December 16, 1993, Hoadley posted a one-page flier on the bulletin board. The middle two-thirds of the flier consisted of a photograph of Caterpillar's chief executive officer, Donald Fites. Above the photograph were the words, ''the real enemy!'' Below the photograph were the words ''permanently replace Fites!''[27]

Wally Kundert is Hoadley's immediate supervisor. At about 1:30 p.m. Kundert removed the flier from the bulletin board.

The following day (December 17) Hoadley posted another one-page flier on the same bulletin board. This one proclaimed that Caterpillar was not serious about resuming bargaining and, in support of that proposition, quoted a December 14 letter to Caterpillar from the UAW's James Atwood. In the center of the page were the words ''No Reply!,'' in large letters (the point being that Caterpillar had so far failed to respond to Atwood's letter).[28]

Plant Superintendent James Goddard removed the flier from the bulletin board a few hours after Kundert had posted it.

Later that day Hoadley posted another copy of the ''No Reply'' flier on the same bulletin board. Still later in the day Foreman Bud Wise removed it. Hoadley, still on December 17, posted a third copy of the ''No Reply'' flier. This time it was Foreman Dave Slightom who removed it. Hoadley then posted another copy of the ''Permanently Replace Fites'' flier. The record does not inform us about what happened to that flier.

None of the supervisors who removed Hoadley's postings said anything about the postings to Hoadley or, for that matter, to any other employee.

II.

The various postings by Hoadley and removals by supervisors present four kinds of issues. The first has to do with whether article 16.4 limits what employees may post on the bulletin board in question. The second is whether, assuming no article 16.4 limitation, the Act protects employees' postings of prounion, anticompany fliers on the bulletin board, given the historical usage of the bulletin board. The third is whether the messages bruited by the ''Permanently Replace Fites'' and ''No Reply'' fliers render their posting unprotected. The fourth is whether Hoadley's actions involving the fliers constituted misbehavior and, if so, whether that misbehavior entitled Caterpillar to remove the fliers even assuming, absent the misbehavior, that the removals would have violated the Act.

The Import of article 16.4. Employers do not ordinarily have to provide union bulletin boards. Caterpillar has done so pursuant to collective-bargaining agreements (and, at present, its implemented proposed agreement). Plainly Caterpillar could, if it so chose, have limited the usage of all union bulletin boards to the usage specified in article 16.4 and could have demanded that employees follow the procedures specified in that provision. But in respect to open union bulletin boards (that is, union bulletin boards that are not glass covered), Caterpillar has not done that.

Caterpillar nonetheless argues that article 16.4 limits what employees may post on union bulletin boards. Caterpillar gets there by reading article 16.4 as prohibiting postings on union bulletin boards that are not in accord with the provision. But on two grounds Caterpillar's argument fails in respect to the open union bulletin boards in building D that are at issue here. First, article 16.4 says nothing about any prohibition. Second, even if could be read as including a prohibition against other kinds of postings and posting procedures, the record shows that Caterpillar has allowed article 16.4 to be ignored in respect to building D's open union bulletin boards. Having done so, Caterpillar may not pick and chose among the postings as to which it will not require to comply with article 16.4 and which it will. See *Honeywell*, supra.[29]

[26] Controversy swirls around what I call the ''employee bulletin boards'' in building D. The record contains conflicting evidence about whether Caterpillar posts rules specifying what may be posted on building D's employee bulletin boards, what has been the supervisors' behavior in respect to those boards, and even what designation is properly given to employee bulletin boards. (One supervisor testified that the boards are called ''For Sale Or Trade'' bulletin boards and are never called ''employee'' bulletin boards.) So far as this proceeding is concerned, however, none of the issues involving building D relate to postings on employee bulletin boards.

[27] The flier is in the record as G.C. Exh. 1053.

[28] The ''No Reply flier'' is in the record as G.C. Exh. 1054.

[29] I do not mean to suggest, of course, that Caterpillar is for all time required to continue the existing state of affairs in respect to the open bulletin boards. Rather, I assume that Caterpillar could at any time adopt a rule limiting the usage of union bulletin boards to

Permissible Postings. As discussed in connection with the building KK employee bulletin boards in East Peoria, employers may lawfully limit the kinds of materials posted on bulletin boards in their facilities. But Caterpillar has not done that in respect to the open union bulletin boards in building D of the Decatur facility. That being the case, Caterpillar may not disallow the posting on such boards of materials within the scope of Section 7. And the ''Permanently Replace Fites'' and ''No Reply'' fliers are plainly within Section 7's purview. In that regard, the ''No Reply'' flier needs no explanation. As for the ''Permanently Replace Fites'' flier, all that need be understood is that in March 1992, during the course of a strike against Caterpillar, the Company notified striking employees that it would permanently replace them if they did not return to work. Many of Caterpillar's employees viewed that as a shocking, insulting, and underhanded threat. Fites, to these employees, not unreasonably was the personification of that threat as well as the person ultimately responsible for Caterpillar refusing to accept the UAW's contract proposals.[30]

Did the fliers' messages present special circumstances. Caterpillar contends that the ''Permanently Replace Fites'' flier—

> can only be read as a malicious personal assault on the Company's Chief Executive Officer . . . a personal, direct, insulting and divisive attack . . . .[31]

But again, a company's chief executive officer must expect to be seen as the personification of the company's management and, to its employees, of the company's labor relations policies. That being the case, and given that the flier explicitly was aimed at Fites in that capacity, it is unhelpful to refer to the flier as a ''personal . . . attack'' on Fites. As for ''malicious'' or ''insulting,'' I do not so read the flier (even assuming that that would render the posting of the flier to be unprotected activity).[32]

Caterpillar also contends that the language of both fliers ''can only be characterized as 'fighting words.'''[33] If Caterpillar had shown that removal of the fliers was ''necessary in order to maintain production or discipline,'' nothing in the Act would have prohibited Caterpillar from pulling the fliers from the bulletin board. *Arkansas-Best Freight System*, supra, 257 NLRB at 424 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804 at fn. 10 (1945)). But Caterpillar failed to make any such showing (and I specifically take into account the *Cat I* evidence designated by the parties in making that finding).

Hoadley's alleged misbehavior. Caterpillar argues that the record shows that Hoadley spent much of December 16 and 17 (the 2 days during which he posted the materials that Caterpillar supervisors removed) watching the bulletin board instead of working. If Hoadley had not been focusing on his work to the extent normally required by the Company, and if Caterpillar had disciplined Hoadley for that behavior, I assume that Caterpillar, in connection with that discipline, could have removed the materials that Hoadley had posted. But none of the supervisors who removed Hoadley's fliers testified that their decisions to remove Hoadley's fliers had anything whatever to do with Hoadley's work or lack thereof. Caterpillar's contention is without substance.

I conclude that when Caterpillar supervisors removed the ''Permanently Replace Fites'' and ''No Reply'' fliers that Hoadley posted on the union bulletin board, Caterpillar violated Section 8(a)(1) of the Act.

THE DECATUR BUILDING B BULLETIN BOARD CASE[34]

I.

Remarkably, each of the three bulletin board cases here under discussion involves a different kind of bulletin board. The East Peoria case involves employee bulletin boards, all of which are located in nonwork areas. The just discussed building D case involves union bulletin boards, all of which, again, are located in nonwork areas. And this case is about a ''cell'' bulletin board, one located squarely in the midst of a work area.

The work areas in Cat's building B in Decatur are divided into ''cells.'' (Cells are the equivalent of departments or manufacturing units.) Caterpillar places bulletin boards in cells where and when needed for work purposes. And in the normal course of events, the only postings on any given cell's bulletin board are those providing information necessary for the work of the employees and supervisors assigned to that cell (information such as output statistics and often-dialed in-plant telephone numbers). Supervisors control all postings on such bulletin boards.

Sometimes, however, a ''cell bulletin board'' remains in place through happenstance after the need for the board has ended. That is the kind of bulletin board with which we are concerned here. The particular cell bulletin board at issue was in department 8333 in building B. It was a cork board with a wood frame and was about 5 feet wide by 3 feet high. (The record does not tell us when the bulletin board had ceased being used for work purposes other than that the board had not been used for work purposes for a substantial period of time, perhaps years.)

II.

At all relevant times Caterpillar employee Dick Goodman worked on the day shift in department 8333. On February 16, 1964, Goodman tacked on the cell bulletin board a February 13, 1994, a copy of an article from a newspaper called the *Catholic Times*.[35] (A friend and fellow Caterpillar employee who worked at another Caterpillar facility had asked Goodman to post the article in Decatur.) The article is 500 or 600 words long, 5 inches high, 10 inches wide.[36]

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that described in art. 16.4 (so long as the Company meets the requirements of Sec. 8(a)(5) and (d)).

[30] Judge Rose earlier reached the same conclusion in *Cat I*. JD–232–94 at 5.

[31] R. Br. 19.

[32] Again, in JD–232–94 Judge Rose reached the same conclusion about the ''permanently replace'' Fites language, albeit in connection with pins and T-shirt displays.

[33] R. Br. at 10.

[34] Case 33–CA–10746.

[35] A copy of the article is in the record as G.C. Exh. 1058.

[36] I note that while there were both union bulletin boards and employee bulletin boards in building B, none were in areas that were adjacent to or could be seen from Goodman's work area.

In one sense the article is about the labor dispute at the Decatur-based company A. E. Staley. More broadly, the article is about the views of a Catholic priest, Father Martin Mangan, about collective bargaining and what Mangan sees as the havoc that large corporations are wreaking on the lives of their employees. The newspaper quotes Mangan as saying, for example:

> Multinational corporations seem to try systematically to destroy unions with economic loss of life for members. . . . We're going to have the rich and the poor and no middle class if collective bargaining and unions are destroyed.

At the time that Goodman posted the article, the board was blank except for a list of some intra-Caterpillar telephone numbers and one grotesque 8-inch by 11-inch cartoon. The cartoon portrays five mice. One is caught in a mousetrap in such a way that its head is pinned to the bottom of the trap and its hindquarters are elevated. A second mouse is on its hind legs behind the first, in a position that suggests that it is copulating with the first. The three other mice are behind the second, apparently awaiting their turns. The caption reads: ''When you're down and out, everyone wants to screw you.'' The cartoon had been on that bulletin board for more than a year.[37]

A variety of materials had been posted on the bulletin board from time to time, such as for-sale notices, newspaper articles, and Caterpillar's newsletters for supervisors. It is unclear how long any one item remained on the board. In any case, as just indicated, only the cartoon and the list of telephone numbers were on the board when Goodman posted his article. The two pieces of paper and the board itself were dirty and tattered.

One might expect that there would be general agreement about whether a cartoon about copulating mice was, or was not, on a bulletin board in the midst of a work area. In fact, however, while Goodman and another employee testified that the cartoon had long been on the board, two supervisors—Terry Dukeman and Larry Bradshaw—each testified that he was sure that no such cartoon had ever been posted there and that, in fact, nothing was on the bulletin board prior to Goodman's posting. As indicated above, I credit the two employees' testimony about this matter. My sense is that the dispute has to do with perception, not truth-telling versus falsehood. I find, that is, that the telephone list and cartoon had been on the board for so many months that they had long before vanished from the awareness of the two supervisors.

Bradshaw (one of the supervisors who testified that no mouse cartoon had ever been on the bulletin board) is a second-shift supervisor in building B. On February 16 (the same day that Goodman had posted the Catholic Times article), Bradshaw noticed the article, removed it from the bulletin board, and dumped it in the nearest trash receptacle. The cartoon remained in place.

On February 17 Goodman saw that the article had been removed and learned from his supervisor, Terry Dukeman, that it was Bradshaw who had removed it.

At about 7 p.m. on February 18 Goodman asked Bradshaw if he had removed the Catholic Times article. Bradshaw said that he had. Bradshaw testified that the conversation ended there. Goodman testified that Bradshaw referred to the article as ''inappropriate,'' which led Goodman to refer to the mouse cartoon.[38] But I need not and, accordingly, shall not resolve that factual dispute other than to find that Goodman did mention the mouse cartoon.

I conclude that Bradshaw's removal of the article constituted a violation of Section 8(a)(1) by Caterpillar.

To begin with, Goodman's posting of the article amounted to an expression by Goodman (and the friend who gave him the article) to fellow employees of the righteousness of the UAW's position in its uphill battle against Caterpillar. That leads me to conclude that Goodman's action and the article come within the protection of Section 7.[39]

Further, Bradshaw's removal of the article would reasonably lead employees to believe that, as among postings unrelated to the work at hand, Caterpillar discriminated against prounion materials. After all, when only three items are on a bulletin board, including a newspaper article about why a local priest supports employees in their collective-bargaining efforts and a cartoon depicting copulating mice, and a supervisor without meaningful explanation removes the newspaper article without removing the cartoon, an employee would have to be broadminded indeed to believe anything else.

True, the bulletin board was in a work area and postings on bulletin boards in work areas ordinarily are limited to materials necessary for the work being done in the area. But the bulletin board in question long ago had ceased to function as a cell bulletin board, the bulletin board had in the past displayed nonwork material, on the days in question it displayed the mouse cartoon, and management had issued no instructions to employees that contradicted the impression that the bulletin board was available to employees for postings that had been created by the display on the board of nonwork materials.

As discussed earlier, when Bradshaw removed the Catholic Times article, it was the only item he noticed on the bulletin board. And as far a Bradshaw was concerned, the only postings allowed on bulletin boards in work areas were those intended to further the work of the personnel in the area. That means that, from Bradshaw's point of view, there was nothing discriminatory about his action removing the article. (Bradshaw credibly testified that he removed the article from the bulletin board because ''it was not supposed to be there . . . . it was not work related.'')[40] But that does not help Caterpillar's cause. For one thing, in bulletin board situations such as the one at hand, a violation of Section 8(a)(1) does not depend on an intent by the employer to discriminate. *Honeywell*, supra. Accord: *Steelcase, Inc*., 316 NLRB 1140, 1143 (1995). For another, Goodman subsequently told Bradshaw about the presence of the cartoon on the bulletin board. At that point Bradshaw could have had a conversation with Goodman that would have remedied, or at least softened, the

[37] A copy of the cartoon is in the record as G.C. Exh. 1057. The copy varies in immaterial ways from the cartoon that was posted on the bulletin board.

[38] Tr. 2841 (witness Goodman).

[39] I note that, prior to the time that Goodman posted the *Catholic Times* article, Caterpillar management had circulated copies of the article to its Decatur-based supervisors.

[40] Tr. 3006.

impression that the removal of the article had given. Bradshaw did not do that.

III.

Bradshaw's immediate supervisor is Terry Dukeman. On the morning of February 18 (the day after Goodman learned that Bradshaw had removed the article), Goodman submitted a grievance about the removal of the newspaper article.[41]

That same morning, perhaps after Goodman and his steward had begun drafting the grievance, Dukeman submitted a work order to have the bulletin board removed. Dukeman's work order stated that the reason the bulletin board had to be removed was that it was a safety hazard. The work order was acted on almost immediately, shortly after Dukeman was handed Goodman's grievance. As the bulletin board was about to be carted away, Goodman asked Dukeman why the bulletin board was being removed. Dukeman told Goodman that the board was a safety hazard.

So we have a bulletin board that had long been in place, the posting on that bulletin board of a written communication within the protections of Section 7, management's removal of the document, a grievance about the removal, and management's removal of the bulletin board hard on the heels of the filing of the grievance.

Additionally, even Dukeman agrees that, but for Goodman's posting of the Catholic Times article, Dukeman would not have had the bulletin board removed. I earlier mentioned that Dukeman was not aware of the copulating mouse cartoon. Actually, the gap in Dukeman's awareness was broader than that: Dukeman had not been conscious of the presence of the bulletin board at all, even though, as he put it, he had walked past the bulletin board ''a thousand times''[42] and even though the bulletin board was within a foot or two of a computer terminal that Dukeman sometimes used. (My initial inclination, of course, was to discredit Dukeman's claim that he was unaware of the bulletin board. On further thought, however, it seems to me that it is entirely possible that a busy supervisor, responsible for the work of employees spread over a relatively large area, would cease being aware of one old bulletin board that had long ago stopped being used for anything that Dukeman cared about. And there was nothing about Dukeman's demeanor that would cause me to discredit him.) Dukeman became aware of the bulletin board only when Goodman spoke to Dukeman about the Catholic Times article. And, necessarily, Dukeman's realization that there was a bulletin board in department 8333 was a predicate for Dukeman's ordering it to be removed.

Further, Goodman, in the presence of employee Mike Ferguson, asked Bradshaw why the bulletin board had been removed. According to the testimony of both Goodman and Ferguson, Bradshaw replied something on the order of, ''I didn't do it, I didn't file the grievance.''[43]

The complaint alleges, and the General Counsel and the Union argue, that Caterpillar's removal of the bulletin board was in direct response to Goodman's posting of the Catholic Times article and to the filing of his grievance and that Caterpillar thereby violated Section 8(a)(1) of the Act.[44] And, plainly, the removal of a bulletin board in retaliation for activity protected by Section 7 violates Section 8(a)(1) of the Act. See, e.g., *Roadway Express v. NLRB*, 831 F.2d 1285 (6th Cir. 1987). Nonetheless, my recommendation is that the allegation be dismissed.

Turning first to the employees' testimony about Bradshaw's remark about ''I didn't file the grievance,'' at the time of that conversation Bradshaw had no idea why the bulletin board had been removed. Thus his remark (assuming that he did in fact utter such a remark) had to have been mere speculation. (As to whether Bradshaw did mention Goodman's grievance, Bradshaw denied doing so. I nonetheless find that it is more probable than not that Goodman's and Ferguson's testimony on the subject was accurate.[45])

Second, there is no doubt that the placement of the bulletin board made it, to some degree, a safety hazard.

Third, as noted above there was nothing about Dukeman's demeanor that caused me to discredit any of his testimony.

Fourth, the probabilities are that Dukeman ordered the removal of the bulletin board before he knew that Goodman was going to file a grievance about the removal of the Catholic Times article.

Lastly, and most importantly, shortly after the bulletin board was removed, Goodman complained to Dukeman about the removal. Dukeman responded by telling Goodman and the other three employees in department 8333 that, if they wanted a bulletin board in their department to replace the one that had been removed, he would have one installed at any location they chose that did not present safety problems. Goodman did not respond to the offer. Goodman's three coworkers told Dukeman to ''forget it.''[46] (The UAW and the General Counsel contend that Dukeman later sought to condition the installation of a bulletin board in department 8333 on a promise by Goodman not to file grievances if supervisors removed material posted by employees. I discuss that below.)

IV.

More than a month after the bulletin board had been removed from department 8333 Goodman saw what he thought was the installation of a cork bulletin board in department 8336 in a location as unsafe as the department 8333 board's. (Goodman probably was mistaken about the installation of bulletin board in 8336 in that timeframe.) That led Goodman to prepare a grievance about the removal of the bulletin board from department 8333.[47]

According to Goodman and his steward, Lenny Allison, they presented the grievance to Dukeman on March 23

[41] A copy of the grievance is in the record as G.C. Exh. 1059. The grievance specifically referred to a cartoon being on the bulletin board. Dukeman answered the grievance by stating that ''the Company reserves the right to monitor, remove and place all material on Company bulletin boards.'' Id.

[42] Tr. 3056.

[43] Goodman at Tr. 2847; Ferguson at Tr. 3116.

[44] The complaint (par. 5(b)) reads:

> On or about February 18, 1994, Respondent, by Terry Dukeman, removed the bulletin board [in the employees' work area in department 8333] because union-related material was posted on it and because a grievance was filed over the Respondent's removal of union-related material from that bulletin board.

[45] The General Counsel does not contend that Bradshaw's remark itself violated the Act.

[46] Dukeman at Tr. 3059–3060.

[47] The grievance is in the record as G.C. Exh. 1063.

(1994). Dukeman, both testified, responded that he would have a bulletin board installed if, but only if, Goodman ''could assure him [Dukeman] that there wouldn't be grievances written over things . . . that [he] and his superintendent deemed inappropriate.''[48] Goodman testified that he withdrew the grievance in order to avoid adding still further tension to an already difficult situation.

Dukeman remembered getting a grievance on the subject in February but flatly denied that he had ever received any such grievance thereafter or that he ever asked for such a promise from Goodman.

I find that Goodman and Allison did present the grievance, as they testified, but that Dukeman did not impose the condition to which Goodman and Allison testified. I make that latter finding for three reasons. The first is that it is unlikely that Dukeman would have imposed such a condition when he had previously offered, without condition, to install a replacement bulletin board in department 8333. The second is that it is even more unlikely that Dukeman would have imposed such a patently unlawful condition in the presence of two UAW adherents, one of whom was a union steward. The third is that it is improbable that Goodman's and Allison's response to the proposed condition would have been to withdraw the grievance.

I accordingly shall recommend that the complaint's allegation in this respect be dismissed.[49]

THE PLANT MANAGER'S ACTIONS AT A UNION IN-PLANT RALLY[50]

I.

During the day-shift's lunch period on January 5, 1994, the UAW held a rally in a nonwork area of building D at Caterpillar's Decatur facility. About 100 employees attended.

Earlier that day Caterpillar employee Gerry Madding had posted several notices of the rally in building D. The notices were about 1 foot by 2 feet in size. Madding taped one of the notices to a wall near an employee bulletin board in the nonwork area where the rally was to be held.

At all relevant times James Goddard was the factory manager in building D. Goddard knew about the rally, of course, and made his way to the rally's site a few minutes after the rally had gotten under way. Goddard stood in back of the gathered employees. Local 751's president, Larry Solomon, was leading the rally. Solomon saw Goddard and asked him if he wanted to say anything. Goddard responded by pulling Madding's notice from the wall and saying that, ''I don't want these posters put on the restroom walls anymore.''[51]

The General Counsel and the UAW contend, and I conclude, that by Goddard's removal of the poster Caterpillar violated Section 8(a)(1) of the Act.

The situation regarding the posting of materials on the walls of Caterpillar's Decatur facility is closely akin to that of the posting of polemic materials on employee bulletin boards in the East Peoria facility (discussed in the first part of this decision). That is, Caterpillar has not promulgated to employees any rule forbidding the taping of materials to plant walls. And while supervisors do routinely remove anything they find that is posted on a wall (as contrasted with postings on bulletin boards), they do not do so consistently. The result is that employees frequently tape notices of various kinds to the plant's walls—notices of, for example, musical events, church functions, fundraisers, and rallies. In Goddard's words, ''sometimes they were removed and sometimes they were allowed to remain.''[52] Lastly, I note that in size and shape the poster that Goddard pulled down was typical of those that employees taped to the plant's walls.

All that being the case, Goddard's vocal and abrupt removal of the rally poster necessarily had a tendency to cause employees to conclude that Caterpillar was discriminating against the posting of union-related materials on plant walls.

II.

Caterpillar contends that the unfair labor practice charge on which the allegations of the complaint regarding Goddard's actions at the rally are based occurred more than 6 months prior to the filing of the charge.[53]

The chronology of events pertinent to the 10(b) defense looks like this:

Date in 1994	Event
January 5	The in-plant rally. Goddard's removal of the poster.
June 16 (less than 6 months after January 5)	Original unfair labor practice charge in Case 33–CA–10744. It alleges that: On or around March 24 . . . the Employer, at its Decatur facility, unlawfully and discriminatorily removed Union flyers from a wall at its facility.
July 11 (more than 6 months after January 5)	First amended charge in Case 33–CA–10744. It amends the original charge by adding: On or around January 12, 1994, Caterpillar Manager Jim Goddard unlawfully removed a union poster from the Decatur facility, threatened to

[48] Tr. 3147.

[49] Complaint par. 5(c) reads: ''[I]n late February or early March, 1994, Respondent, by Terry Dukeman, told employees that if grievances were not filed when items were removed by management, the bulletin board [in department 8333] would be restored to its original position.''

[50] This case is Case 33–CA–10744.

[51] Witness Goddard at Tr. 2910. The restrooms in building D are spaces within the plant enclosed by cinder block walls. Madding had taped the poster to the outside—the plant side—of the wall, and, throughout the plant, postings taped to walls were generally on the outside of restroom walls. Thus Goddard's reference to ''rest room walls.''

[52] Tr. 2969.

[53] ''[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .'' Sec. 10(b) of the Act. Caterpillar amended its answer to include this defense at the hearing. Tr. 2563.

> retaliate against the employee who put up the poster, and otherwise interfered with the Union rally held that day.[54]

The issue is whether the June 16 unfair labor practice allegation is ''closely related'' to the complaint's allegation,[55] whether the complaint's allegation ''arise[s] from the same factual situation, [is] of the same class as, and clearly related to [the allegation] . . . set forth in the charge.'' *Redd-I, Inc*., 290 NLRB 1115, 1116 (1988), quoting *NLRB v. Dinion Coil Co*., 201 F.2d 484, 491 (2d Cir. 1952), and *Jack LaLanne Management Corp*., 218 NLRB 900, 913 (1975), enfd. 539 F.2d 292, 295 (2d Cir. 1976).

If the original charge's allegation referred to a date close to January 5, it is clear that Section 10(b) would be of no concern in respect to Goddard's removing the notice from the wall. Does the charge's reference, instead, to March 24 render the allegation not ''closely related''? I conclude otherwise.

Caterpillar also contends that, by reason of the terms of article 16.4 of the implemented agreement, all notices of in-plant rallies were required to be posted only on union bulletin boards. But for the reasons discussed in connection with the *East Peoria* case, supra, and the case involving Hoadley's postings on a union bulletin board in building D, I conclude that article 16.4 does not have that effect.

Finally, Caterpillar contends that since the rally notice was posted on a wall, it was ''nothing more than unprotected graffiti,''[56] that the rally, and, therefore, the notice were a part of an illicit in-plant campaign, that the removal of the rally notice occurred too late to have any impact on the rally itself, and that Madding had alternative means of publicizing the rally. I have considered these arguments but conclude that none merits response.

III.

Madding testified that Goddard, speaking to employees at the rally, asked for the name of the employee who had put up the poster and then went on to threaten to fire or otherwise discipline that employee. The complaint alleges that Caterpillar violated the Act when Goddard uttered that threat of discipline. But Goddard denied uttering any such threat, and I credit that denial. I accordingly shall recommend that paragraph 5(e) of the complaint be dismissed.[57]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[58]

ORDER

The Respondent, Caterpillar, Inc., East Peoria and Decatur, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily removing from bulletin boards or plant walls notices of union events or other postings supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or a UAW local union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at the following of its facilities in Illinois copies of the attached notice marked ''Appendix'': building KK in East Peoria, and buildings B and D in Decatur.[59] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by Caterpillar's authorized representative, shall be posted by Caterpillar and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Caterpillar shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, Caterpillar has gone out of business or closed the facilities involved in this proceeding, Caterpillar shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Caterpillar at any time since April 28, 1994 (in respect to its East Peoria facility), or June 16, 1994 (in respect to its Decatur facility).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Caterpillar has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[54] The reference to Goddard ''otherwise interfer[ing] with the Union rally'' was deleted by way of the UAW's second amended charge.

[55] ''On an unknown but specific date in early February, 1994, Respondent, by Jim Goddard, removed a union notice from the wall just adjacent to a bulletin board in department or location D408 at Respondent's Decatur, Illinois facility, that contained both-work-related and non-work items.'' (Par. 5(d).)

[56] Caterpillar's Br. at 24.

[57] Par. 5(e) reads: ''On an unknown but specific date [in early February, 1994], Respondent, by Jim Goddard, threatened to fire or otherwise discipline the employee who posted the notice . . . .'' Caterpillar also raises its 10(b) defense in respect to this allegation. But in view of my crediting Goddard's denial, I need not pass on that defense.

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[59] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''